



June 8, 1999

Mr. Kevin McCalla
Director, General Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR99-1587

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 124640.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for the names, job titles, and commission divisions of attendees of a particular meeting that occurred on October 9, 1998. The requestor also seeks all "reports, notes, minutes, taped recordings, interoffice memos, e-mails, letters, etc. regarding" the referenced meeting. Finally, the requestor seeks the names of all individuals who received a copy of an October 13, 1998 letter addressed to the requestor concerning the meeting. You have submitted to this office as responsive to the request three groups of documents, which you contend are excepted from required public disclosure pursuant to sections 552.107(1), 552.101 and 552.108, and 552.111 of the Government Code, respectively. We will discuss each of these groups of documents in turn.

You first contend that the contents of Exhibit B may be withheld from the public pursuant to section 552.107(1), which protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. After reviewing the contents of Exhibit B, we agree that portions of some of these documents may properly be withheld from the public pursuant to section 552.107(1). We have marked the portions of these documents the commission may withhold under this exception.

You next contend that the contents of Exhibit C may be withheld pursuant to the common-law right of privacy, as incorporated into section 552.101 of the Government Code, as well as section 552.108. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming

within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. You contend that releasing the identities of the requested commission employees' names and statements "could impede the safety of" the employees. This office has previously determined that identifying information about public employees may be withheld pursuant to common-law privacy only upon a demonstration of "truly exceptional circumstances such as, for instance, an imminent threat of physical danger." Open Records Decision No. 169 at 6 (1977). No such showing has been made in this instance. We therefore conclude that the withholding of commission employees' identities is not warranted here. *See also* Gov't Code § 552.022(2) (names of public employees specifically made "public information").

Section 552.108 of the Government Code excepts from public disclosure certain information "held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime." You have not demonstrated that any of the information contained in Exhibit C meets this criteria. It does not appear to this office that the "security" officers contracted by the commission are peace officers in the employment of a law-enforcement agency for purposes of section 552.108, nor have you represented that the commission has referred, or currently intends to refer, any of these records to a law enforcement agency in connection with this or any related matter. *See, e.g.*, Open Records Decision Nos. 474 (1987), 372 (1983) (section 552.108 may be invoked by any proper custodian of information which relates to criminal incident). Consequently, the commission may not withhold any of the information at issue pursuant to section 552.108.

Finally, you seek to withhold the contents of Exhibit D pursuant to section 552.111 of the Government Code. Section 552.111 excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters [Emphasis in original.]

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. ORD 615 at 5. Most of the information contained in Exhibit D is purely factual in nature. To the extent that opinions

are expressed, we do not believe that the content of most of these documents may properly be characterized as "policymaking." Rather, most of these documents reflect commission personnel addressing the manner in which the problems created by a single individual may best be resolved. We have, however, marked two portions of one memorandum that we believe may properly be withheld under section 552.111. The remaining information must be released, except as addressed above.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/RWP/eaf

Ref.: ID# 124640

encl: Marked documents

cc: Mr. Clay Rooker
4822 Merwin Street, #4
Houston, Texas 77027
(w/o enclosures)